



Commonwealth of Massachusetts

State Ethics Commission

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Linda Marinelli
Oak Bluffs, MA 02557

PUBLIC ENFORCEMENT LETTER 95-3

Dear Ms. Marinelli:

As you know, the Commission has been investigating allegations that you, as an Oak Bluffs selectman, violated the conflict of interest law, G.L. c. 268A, by your involvement in the 1993 award of a taxi license to your daughter. The results of our investigation (discussed below) indicate that the conflict of interest law may have been violated in this case. In view of certain mitigating circumstances (also discussed below), the Commission, however, does not believe that further proceedings are warranted. Rather, the Commission has determined that the public interest would be better served by bringing to your attention the facts revealed by our investigation and by explaining the application of the law to such facts, trusting that this advice will ensure your future understanding of the law. By agreeing to this public letter as a final resolution of this matter, the Commission and you are agreeing that there will be no formal action against you and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. Briefly stated, the relevant chronology is as follows:

You were elected to the Oak Bluffs Board of Selectmen ("Board") in April 1984 and served until April 1993. While so serving, you were the chairman of the Board. You have a daughter, Diane Habekost ("Habekost").

As of January 1993, there were only four taxi cab company licenses in Oak Bluffs. The Board had turned down the previous several requests for additional licenses.

In January 1993, your daughter filed an application with the Board for a taxi license.

On March 9, 1993, the Board considered your daughter's license application. You chaired the meeting. You read a letter from Habekost into the record. You stated you would abstain from comments because Habekost was your daughter, but you remained in the room. Various cab owners opposed the license. You chaired the discussion, and responded to certain comments made from the audience. Consideration of the license was tabled until the board could investigate further.

On March 16, 1993, the Board conducted another public meeting to consider your daughter's application. You abstained and left the room. Again, various owners opposed the license. The application apparently failed on a one to one vote with Selectman Jane Votta voting in favor and Selectman Steven Kenney ("Kenney") voting against.^{1/}

On March 23, 1993, the Board held another public meeting on the application; you abstained and left the room. No opposing owners were present. (Apparently, they were not notified that the issue would be reconsidered.) The Board voted two to nothing in favor of the application.

Your term as a Board member ended on April 14, 1993. You were unsuccessful in your reelection bid.

2. Kenney provided the following information:

From October 1991 to April 15, 1994, Kenney was a selectman.

The first hearing on Habekost's license was on March 9, 1993. Habekost argued that the community was not being serviced properly by taxi companies and that the town could use another company. Several taxi owners argued that there was not enough business and to grant another taxi license would create unfair competition. The taxi owners argued that in the recent past all new additional taxi license applications had been denied. After hearing the concerns of taxi owners, Kenney was confused and did not want to issue another license, nor deny one, without further study. Kenney wanted to study the taxi regulations in Oak Bluffs and to look at why other taxi licenses had been denied in the past. Kenney moved that the matter be tabled until the following meeting and that was the action taken.

At the March 16, 1993 meeting, taxi owners again reiterated that an additional taxi license would create undue competition. Habekost argued that the people in the town needed better taxi service. Kenney felt that there were not enough regulations in place to regulate the taxi business in the town, and there seemed to be no established procedures to direct the selectmen on whether or not to approve taxi licenses. A vote was taken and Kenney voted to deny the issuance of the license, with Votta voting to issue the license. Since the vote was split 1-1, and you had abstained, the license was denied.

One or two days after the March 16, 1993 meeting, Kenney happened to meet you at the Board of Selectmen's office. This was not a planned meeting and it was simply a coincidence that you and he met. There was no one else present in the office. You asked Kenney as to why he had voted not to issue the taxi license to Habekost. Kenney again expressed his concerns over taxi regulations. You became very upset. You stated that Habekost had every right to apply for a taxi license. Kenney emphasized to you that there was nothing political in the denial of Habekost's license, and again stated his concerns over taxi regulations. As the discussion went on, and you continued to be agitated, Kenney mentioned to you that the discussion was not appropriate and you should be concerned about the appearance of conflict of interest in having such discussions. You felt that your daughter was being picked on by the town. Not wanting to discuss the matter further, Kenney abruptly left the room. Kenney became upset because it seemed as if you were insinuating that Habekost had been wronged in some way. The discussion was a short one, three or four minutes. Although you were visibly upset during the discussion, you did not make any threats to Kenney. You did not ask Kenney to make any special accommodations for Habekost, nor did you ask Kenney to change his mind in voting for the license.

After the March 16, 1993 hearing, the press reported about the license and the opposition by taxi owners. Kenney began to receive a number of calls on both sides of the issue. Due to the number of phone calls he received, Kenney continued to look at taxi regulations and other taxi issues in Oak Bluffs. Kenney felt pressured by the community to reconsider whether or not a license should be issued to Habekost. At the March 23, 1993 meeting, Kenney reconsidered the license issue because (1) he felt that Habekost was certainly deserving of the right to have a license, as long as some regulatory issues could be worked out, and (2) because of the number of phone calls that he received complaining about other taxi companies.

Kenney cannot recall whether the Habekost license issue was on the agenda for the March 23, 1993 meeting. If the matter was on the agenda, the clerk may have put it there because there was some confusion as to whether or not a formal vote had taken place at the March 16, 1993 hearing. He believes, but could not specifically recall, that he probably brought the issue up at the third meeting because he had been doing his research and had changed his mind.^{2/}

3. You provided the following information:

You had no part in assisting Habekost prepare her taxi license application. Habekost did all the paperwork and all the representation for her taxi license herself.

You did not help Habekost in preparing for the March 9, 1993 hearing. After the meeting on March 9, 1993, you may have had discussions with Habekost regarding your conflict of interest issues and the fact that you would refrain from any participation in Habekost's license request. Aside from this possible conflict of interest related discussion, you had no discussions with Habekost regarding the taxi license. You never gave Habekost

any advice on how to proceed in requesting her license, or how she should go about persuading the selectmen to approve the license.

You had no recollection of meeting privately with Kenney prior to the March 23, 1993 meeting. It is possible that you did meet with Kenney and asked him as to his reasons for having denied the license, and Kenney informed you that he wanted to look into past license denials and taxi regulations. You did not do anything to persuade Kenney to change his vote and grant the license to Habekost, or in any way ask Kenney to change his vote.

II. Conflict Law

As a member of the Oak Bluffs Board of Selectmen, you were a “municipal employee” as that term is defined in G.L. c. 268A, §1. As such, you were subject to the conflict of interest law, G.L. c. 268A, generally, and in particular to §23, the so-called “code of conduct” section of the conflict of interest law. The sub-parts of that section which apply to your situation are §23(b)(2) and §23(b)(3). Section 23(b)(2) prohibits any municipal employee from using or attempting to use his position to secure an unwarranted privilege of substantial value for anyone. Its purpose is self-explanatory. Section 23(b)(3) prohibits a municipal employee from causing a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person’s favor in the performance of his official duties. This latter subsection’s purpose is to deal with appearances of impropriety, and in particular, appearances that public officials have given people preferential treatment. This subsection goes on to provide that the appearance of impropriety can be avoided if the public employee discloses in writing to his appointing authority (or if he does not have an appointing authority, files a written disclosure with the town clerk) all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record. (If the public employee is elected, his public disclosure to the town clerk must also be maintained as a public record.)

There is reasonable cause to believe that you violated §23(b)(2). Thus, in the Commission’s view, your status of being a selectman gave you entree to your fellow selectmen, especially Kenney, who had the deciding vote. You made use of this entree by having a three to four minute discussion with Kenney as described above. The discussion took place at a critical point in time, i.e., between the apparent one to one vote not to approve and the reconsideration vote which resulted in the approval. The entree was of substantial value because it could influence the ultimate decision. See, *Burke*, 1985 SEC 246, 251 (access to CEOs for the purpose of having an opportunity to make an insurance pitch was of “substantial value”). Using your position in this manner was unwarranted because the matter in question involved your daughter.^{3/} Such entree would not be available to other similarly situated license applicants or their advocates. Therefore, it appears that you violated §23(b)(2) by this conduct.

There is also reasonable cause to believe that your conduct violated §23(b)(3). Thus, your discussing the license matter with Selectman Kenney between the second and third hearings created an appearance of impropriety. It would seem that your conduct as a selectman could be unduly influenced by kinship. The appearance of impropriety is underscored by the fact that the license in question was very valuable, the meeting took place shortly before Selectman Kenney voted to reconsider, the opponents were apparently not given notice that the matter would be reconsidered, and for a number of years all applications for new taxi licenses had been denied.

The Commission could have directed the staff to commence adjudicatory proceedings in which, if you were found to have violated G.L. c. 268A, §23, fines of up to \$2,000 for each violation could have been imposed. The Commission chose to resolve this matter with this letter, however, because the violations appear to have involved a spontaneous and abbreviated outburst on your part which, according to Selectman Kenney, did not influence his decision. We also note that you fully cooperated with the Commission in its investigation.

III. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and future compliance with, the conflict of interest law. This matter is now closed.

DATE: January 17, 1995

^{1/} It is not entirely clear whether Kenney voted against the application or simply indicated he was not prepared to vote in favor of it. In any event, the application failed to obtain the necessary two affirmative votes.

^{2/} Board of Selectmen Clerk Janice Wright had no recollection as to how the license matter was brought up again at the third hearing.

^{3/} Your involvement in a matter in which your daughter had a financial interest raises an issue under §19 of the conflict of interest law, which prohibits a municipal employee from participating as such in a particular matter in which to her knowledge an immediate family member (among others) has a financial interest. It is not clear whether in meeting with Selectman Kenney you were “participating” in the license matter within the meaning of §19; in any event, the conduct seems more appropriately analyzed under §23.